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Malaysia: Catch-22 Implications of Anwar Ibrahim's Acquittal

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On the government of Malaysia's side it is whether or not to appeal against the High Court decision to acquit the former Deputy Prime Minister of the charge of sodomy under the country's Penal Code. Both the government and the Anwar-led opposition were surprised by the decision. Anwar's lawyers – and Anwar himself – had expected a guilty verdict. The decision on whether or not to go to the Court of Appeal would be based rather more on political considerations than on legal merit. However, having claimed the acquittal proved the case had been pursued on the basis of due legal process and the court decision based on demonstrated independence of the judiciary, the government would not want to be seen to interfere with what should be the professional decision of the Attorney-General's chambers. If due legal process was the basis for the pursuit of the case over almost three years, it must be seen to continue to be the situation now. Especially as the complainant in the sodomy charge, Anwar's former personal aide, has stated he wishes to see an appeal made. Nevertheless there is a professional decision to be made based on legal merit, whether the doubt on the veracity of the DNA samples adduced by the prosecution which led the High Court judge to his decision to acquit Anwar was well-placed in fact. In law, it is clear with doubt, there can be no conviction. This was the case with respect to the decision of the highest court of appeal in 2004 when Anwar's previous conviction (and the then upcoming nine years imprisonment after having served six for abuse of power) in what has become known as Sodomy 1, was quashed. Would it not be better, therefore, for the government not to prolong the agony of having the case run, and instead milk the benefit that comes from apparent adherence to due process, rule of law, separation of powers and independence of the judiciary? The prosecution team, who seem to have screwed-up, would want to make amends of course. But would it not be like bolting the stable doors after the horses have bolted? To appeal or not to appeal, that is the question.



Anwar Ibrahim (photo by lastsham edited by dsmurat)

Those legal niceties such as due process and independence of the judiciary were not matters highlighted by then Prime Minister Dr. Mahathir Mohamad when Anwar's conviction in Sodomy 1 was quashed. He repeated in his Memoirs it was only based on a technicality (doubt) and did not extinguish the matter of the former Deputy Prime Minister's sexual inclinations. Present Prime Minister Najib Razak however has stated the acquittal yesterday (Monday 9 January) proved due process, rule of law in the country, independence of the judiciary based on the separation of powers – he did not say the acquittal was based on a mere technicality. If Mahathir was not alive he would have turned in his grave. Being alive, he has said Anwar would remain the issue whether or not he was acquitted. For Najib, as he plans for the next general election, how much would he want Anwar to be an issue? Would it not be better to move on with his reform programme and extract greater credibility for it with Anwar's acquittal? Being human, judges are also affected by the environment of reform. Would an appeal, which could be lost in any case, not prolong and foist Anwar as the issue when he wants to base his election campaign on real issues of change, including signs of a judiciary beginning to look less inhibited by the executive? It is interesting that some leaders of the ruling Umno party have come out with statements on concepts many thought previously alien to them, such as the rule of law. The thing is to turn this into a chorus and fundamental belief – the stuff of reform which must also reach the political party, beyond reforms in governmental performance and economic transformation programmes Najib has creatively introduced. It is also interesting the pro-Umno Malay language newspaper Utusan Malaysia chose to highlight the fracas caused by Anwar supporters (numbers apparently much, much less than the opposition expected) in the car park of the court building in Kuala Lumpur and two small bomb explosions (which went off after the judge had delivered his two-minute decision) hurting five people; the threat to public order must be a matter of concern not just to the middle classes but also to the conservative Malays who sense an attack on their political domination when public order is disturbed.

For the opposition Pakatan Rakyat which Anwar leads, his acquittal removes an uncertainty over his continued role in the party and the election campaign. He flew to India before going next to Turkey last night (Monday, 9 January, previously arranged, but on day of acquittal which could have been conviction when notice of appeal would have been immediately made). This is Anwar, carrying on regardless, taking risks, sailing close to the wind, fighting the good fight as he sees it, making electrifying speeches at home and abroad, charming his way into the hearts of many people. He will be back for the Pakatan Rakyat political convention on Saturday 14 January in Mahathir's home state of Kedah which is controlled by the opposition. This will be heady political stuff, the first celebration of his acquittal and, most likely, a clarion call to bring down the government in the next election. He cannot recognise too much the unfettered decision of the High Court judge; instead he is more likely to say even the courts could not ignore the blatant "stitched-up" and "baseless" and "politically-motivated" charge against him. The government, therefore, is the evil and unjust party which must be removed. On to Putrajaya, the seat of central government! His lead lawyer (an old stalwart of the Democratic Action Party, member of the opposition coalition), however, does seem to have a worry about the prosecution appealing against the acquittal when he said it was founded on sound legal basis, that

there should not in the slightest be a decision to lodge an appeal. It has been a long road and it has been exhausting. The uncertainty has been removed, let it not be just for now. And on with the political battle.

The political battle will be tricky for both sides. Both are now talking reform. Insofar as the Anwar case is concerned, both will want to extract advantage from it. The government, with or without an appeal, will say the law has or will take its course. It has been shown, a judicial process without intervention from the executive. With or without an appeal, the opposition will say it has all been, or is, a political vendetta in which Anwar is victim. That is why it might be better for the government to move on, fight on more substantive issues, and not be dragged down by Anwar. Show reform when Anwar can only talk about it. Show and promise results when performance in the five (now four) opposition-ruled states has been uneven and patchy. The quality and showing of opposition MPs and state assemblymen have been unsatisfactory, less satisfactory than those from government parties. Hence Anwar promises there will be 40 per cent new candidates standing in the next election. But the reforms Pakatan Rakyat continually talks about are more in the realm of ideas and rhetoric, while Najib's offering is substantial and real. Anwar will have to talk more substance and Najib more political ideals and concepts. Substantial matters have never sat particularly well with Anwar who does better on the outside looking in. Modern and democratic rights are ideas, on the other hand, that have not sat well with Najib's party, Umno. So, as the opposition is more likely to be political rights focussed, using the Anwar sodomy cases as evidence of corruption and injustice, Najib has to show reform in the government is not just the inclination of an individual leader, but that of his party and its other leaders as well. They have to show credibility inasmuch as Najib's will be attacked.

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